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8
9 **UNITED STATES DISTRICT COURT**
10 **DISTRICT OF NEVADA**
11

12 NICHOLAS V. MAESTAS,

13 Plaintiff,

14 v.

15 LEGRAND, et al.

16 Defendants.

Case No. 3:10-cv-00585-HDM-VPC

MOTION TO DISMISS

17 Defendants Travis Bennett, Bruce Harkreader, Valaree Olivas, and Kirk Widmar, by and
18 through their attorneys, Catherine Cortez Masto, Attorney General for the State of Nevada, and
19 Susan E. Lee Deputy Attorney General, move for partial dismissal of this matter for failure to
20 exhaust administrative remedies. This Motion is made pursuant to Federal Rule of Civil
21 Procedure (Fed. R. Civ. P.) 12(b); it is based upon the following Memorandum of Points and
22 Authorities, and all of the documents and pleadings on file in this case.

23 **MEMORANDUM OF POINTS AND AUTHORITIES**

24 **I. NATURE OF THE MOTION**

25 Some of Plaintiff's claims which survived screening are barred because he failed to
26 exhaust administrative remedies as required by § 1997e(a).

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1 **II. BRIEF STATEMENT OF THE CASE**

2 Plaintiff is an inmate in the custody of the Nevada Department of Corrections (NDOC).
 3 Defendants are employees or former employees of the NDOC. Pursuant to this Court's Order,
 4 the claims which survived screening are: Count I against Defendant Bennett; Count II against
 5 Defendants Harkreader, Widmar and DeGoyler;¹ Count IV against Defendants Olivas, Widmar,
 6 Harkreader, DeGoyler and Bennett; Count V against Defendant Widmar; Count VI against
 7 Defendant Widmar; Count VII against Defendant Widmar; and Count VIII against Defendant
 8 Widmar. #12,² p.11.

9 **III. LEGAL STANDARDS**

10 **A. Fed. R. Civ. P. 12(b)**

11 Failure to exhaust nonjudicial remedies is a matter of abatement and is properly raised in
 12 an unenumerated Rule 12(b) motion. *Wyatt v. Terhune*, 315 F.3d 1108, 1119 (9th Cir. 2003).
 13 This is so because while a motion for summary judgment is decided on the merits, dismissal for
 14 failure to exhaust administrative remedies is not. *Id.* (citations omitted). Nevertheless, "[i]n
 15 deciding a motion to dismiss for a failure to exhaust nonjudicial remedies, the court may look
 16 beyond the pleadings" *Id.* at 1119-1120.

17 **B. 42 USCA § 1997e(a)**

18 Plaintiff has brought suit against Defendants pursuant to 42 USCA § 1983 for alleged
 19 violations of Plaintiff's constitutional rights. In order to bring a lawsuit pursuant to Section 1983,
 20 an incarcerated person must comply with the Prison Litigation Reform Act (PLRA). The PLRA
 21 provides that "[n]o action shall be brought with respect to prison conditions under section 1983
 22 of this title, or any other Federal law, by a prisoner confined in any jail, prison, or other
 23 correctional facility until such administrative remedies as are available are exhausted." 42 USCA
 24 § 1997e(a). The administrative remedy must be exhausted *prior to* the filing of the civil action.
 25 See *McKinney v. Carey*, 311 F.3d 1198, 1200-1201 (9th Cir. 2002).

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27 ¹ The Attorney General's Office has not accepted service for Cody DeGoyler.

28 ² This number references the Court's docket number.

“There is no question that exhaustion is mandatory under the PLRA.” *Bock v. Jones*, 549 U.S. 199, 199-200 (2007) (*citing Porter v. Nussle*, 534 U.S. 516, 524 (2002)). In order to satisfy the exhaustion requirement of the PLRA, “*proper* exhaustion of administrative remedies is necessary.” *Woodford v. Ngo*, 548 U.S. 81, 84 (2006) (emphasis added). “Proper exhaustion *demand*s compliance with an agency’s deadlines and other critical procedural rules because no adjudicative system can function effectively without imposing some orderly structure on the course of its proceedings.” *Id.* at 90-91 (emphasis added). It is the prison’s own grievance process, not the PLRA, which determines what requirements must be met in order to satisfy the PLRA exhaustion requirement. *See Griffin v. Arapio*, 557 F.3d 1117, 1119 (9th Cir. 2009) (*citing Jones v. Bock*, 549 U.S. 119, 218 (2007)). One of the main purposes of exhaustion is to give “an agency ‘an opportunity to correct its own mistakes with respect to the programs it administers before it is haled into federal court.’” *Woodford*, 548 U.S. at 89 (*quoting McCarthy v. Madigan*, 503 U.S. 140, 145 (1992)).

IV. DISCUSSION

The administrative remedies available to an inmate in the custody of NDOC are governed by Administrative Regulation (AR) 740. *See* Exhibit A. AR 740 defines a grievance as “A written complaint consisting of one claim, issue, circumstance or action considered by the inmate to be injurious or unjust, and which is addressable as outlined in this regulation.” Exhibit A, pp. 3, 47.

Pursuant to AR 740 the grievance process has three levels or review: informal, level one and level two. *See* Exhibit A, pp. 10, 40-45. At the informal level, for issues other than torts, a grievance must be filed within six (6) calendar months. *See* Exhibit A, pp. 13, 43. If an inmate disagrees with the response to the informal grievance, he has five (5) calendar days to appeal to the next level. *See* Exhibit A, pp. 12, 44. If an inmate does not receive a response within the required timeframe, he may proceed to the next level. *See* Exhibit A, pp. 13, 41. If an inmate submits a grievance that is improper for any reason, pursuant to the regulation he is not given additional time to re-submit the grievance, and failure to re-submit the grievance in the proper form within the proscribed time frame constitutes abandonment. Exhibit A, pp. 7, 41.

1 **A. Count I**

2 As an initial matter, Defendants note that in his Second Amended Complaint, Plaintiff
 3 asserts that grievance number 20062896604 filed on April 15, 2010 satisfies the exhaustion
 4 requirement for all of his claims. #13, p. 21. In Count I Plaintiff alleges that between September
 5 24, 2009 and December 23, 2009, Defendant Bennett retaliated against him for filing a
 6 grievance against him. #13, p. 7-8; #12, p. 4. Specifically, Plaintiff contends that “after he filed
 7 a grievance against Bennett, defendant Bennett then retaliated by issuing a disciplinary charge
 8 against plaintiff and interfering with his receipt of a package.” #12, p.4. The grievance which
 9 Plaintiff alleges caused the retaliation is #20062882885, which addressed an issue which
 10 occurred on September 24, 2009. See Exhibit B, p. 31; Exhibit C. The alleged retaliation
 11 occurred between September 24, 2009 and December 23, 2009 according to Plaintiff’s
 12 Complaint, and on October 16, 2009 according to a grievance Plaintiff subsequently submitted
 13 to prison officials. See #13, p. 7-8; #12, p. 4; Exhibit B, p. 29.

14 Grievance #20062896604 cannot satisfy the exhaustion requirement for Count I for at
 15 least two reasons. First, pursuant to AR 740 Plaintiff had six (6) months the date of the alleged
 16 retaliation to file a timely grievance. Exhibit A, pp. 13, 43. By any date alleged by Plaintiff, this
 17 grievance is untimely and therefore improper. See *Woodford*, 548 U.S. at 90-91. Second, the
 18 grievance does not address the issue of Defendant Bennett’s alleged retaliation, therefore, it
 19 does not “provide enough information to . . . allow prison officials to take appropriate responsive
 20 measures” regarding this claim. See *Griffin*, 557 F.3d at 1120-1121, quoting *Johnson v.*
 21 *Testman*, 385 F.3d 691, 697 (2nd Cir. 2004).³ In order to properly exhaust this claim Plaintiff
 22 must have given NDOC “an opportunity to correct its own mistakes with respect to the
 23 programs it administers before it is haled into federal court,” by properly filing and exhausting
 24 this claim. See *Woodford*, 548 U.S. at 89 (quoting *McCarthy v. Madigan*, 503 U.S. 140, 145
 25 (1992)). Grievance #20062882885 does not give prison officials notice of Plaintiff’s allegation
 26 that Defendant Bennett retaliated against him for the grievance filed October 21, 2009.

27
 28 ³ “A grievance need not include legal terminology or legal theories” or “every fact necessary to prove each
 element of an eventual legal claim.” *Griffin*, 557 F.3d at 1120. Nevertheless, it must contain enough factual
 information to provide notice to prison staff of a particular problem and facilitate its resolution. *Id.*

Moreover, a review of Plaintiff's grievance history shows that the only proper grievance which can reasonably be construed to address this incident was Grievance #20062884437. Exhibit B, p. 29; Exhibit D. Grievance #20062884437 alleged retaliation by Defendant Bennett, in the form of "2 misconduct reports." The grievance does not allege any retaliation in the form of "interfering with the receipt of a package." Exhibit B, p. 29; #12, p.4; Exhibit D. Therefore, to the extent Count I alleges retaliation by interference with a package, it must be dismissed for failure to exhaust pursuant to the PLRA.

B. Count II

In Count II Plaintiff alleges that "in December 2009, Defendant Harkreader attempted to persuade him to drop his grievances." #12, p. 5. Plaintiff also alleges in Count II that on February 2, 2010 Defendants Harkreader, Widmar and DeGoyler retaliated against him by using the Prison Rape Elimination Act (PREA) as a pretext to put him in administrative segregation. #12, p. 5.

Plaintiff filed a timely grievance, #200928896604, alleging that the PREA investigation was a pretext, as was a disciplinary action for attempting to contact his former cell mate. Exhibit B, p. 22; Exhibit E. The grievance was rejected as procedurally improper because Plaintiff was attempting to grieve an issue related to a prior grievance, as well as bringing the PREA issue for the first time. Pursuant to AR 740 may consist "of *one* claim, issue, circumstance or action considered by the inmate to be injurious or unjust, and which is addressable as outlined in this regulation." Exhibit A, pp. 3, 47 (emphasis added). Plaintiff did not file a proper grievance regarding the PREA allegation, and therefore abandoned this claim. Exhibit B, p. 22.⁴

Accordingly, Plaintiff has failed to properly exhaust available administrative remedies for the allegations contained in Count II prior to filing his lawsuit in federal court. See *Griffin*, 557

⁴ Although the prior grievance, #20062899399, was appealed through all levels, it does not exhaust the issue that the PREA investigation itself was retaliatory. In the grievance, although Plaintiff asserts retaliation, he specifically asserts that the retaliation is in the form a disciplinary action for attempting to contact his former cell mate who was on parole at the time. Exhibit F. While this issue is tangential to the PREA investigation, as the former cell mate was involved in the alleged PREA violation, the disciplinary did not address the PREA investigation itself, but only the disciplinary action for improperly attempting to contact an unauthorized person. Nor did the grievance and subsequent appeal raise the issue. Exhibit F. Accordingly, grievance #20062899399 does not provide prison officials with any information which would lead them understand that Plaintiff was alleging the PREA investigation itself was retaliatory and to take appropriate responsive measure if necessary. See *Griffin*, 557 F. #d at 1120-1121.

1 F.3d at 1119; *McKinney*, 311 F.3d at 1200-1201. Therefore, the PLRA requires that Count II of
 2 Plaintiff's Complaint be dismissed.

3 **C. Count V**

4 In its screening Order the Court found that "To the extent that plaintiff alleges that
 5 defendant Widmar's actions on April 2, 2010, were a continuation of the February 2, 2010
 6 retaliatory act of placing plaintiff in administrative segregation based on investigation of PREA
 7 (Prison Rape Elimination Act), plaintiff's retaliation claim against defendant Widmar in Count V
 8 may proceed." #12, p. 7.

9 For the reasons discussed above, Plaintiff has failed to properly exhaust available
 10 administrative remedies for the allegations contained in this Count prior to filing his lawsuit in
 11 federal court. See *Griffin*, 557 F.3d at 1119; *McKinney*, 311 F.3d at 1200-1201. Therefore, the
 12 PLRA requires that Count V of Plaintiff's Complaint be dismissed.

13 **V. CONCLUSION**

14 Based upon the foregoing, Defendants respectfully submit that their Motion to Dismiss
 15 should be granted, Count I of Plaintiff's Complaint must be partially dismissed and Counts II and
 16 V must be dismissed in their entirety for failure to comply with the exhaustion requirement of the
 17 PLRA.

18 Dated this 28th day of July, 2011.

19 CATHERINE CORTEZ MASTO
 20 Attorney General

21 By: _____

Susan E. Lee

22 SUSAN E. LEE
 23 Deputy Attorney General
 24 Bureau of Litigation

Attorneys for Defendants

CERTIFICATE OF SERVICE

I certify that I am an employee of the Office of the Attorney General, State of Nevada, and that on this 28th day of July, 2011 I have caused a copy of the foregoing **MOTION TO DISMISS** to be served, by mailing a true copy to:

NICHOLAS V. MAESTAS #75777
LOVELOCK CORRECTIONAL CENTER
1200 PRISON ROAD
LOVELOCK NV 89419

N. Wilson